Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

April 2008

Who is the prevailing party? Where plaintiff obtains a verdict in his or her favor, but, because of earlier settlements exceeding the amount of the verdict, judgment is entered in favor of defendant, who is the "prevailing party" entitled to costs (and, depending on the type of case, attorney fees)? In *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, [52 Cal.Rptr.3d 400], a majority of the court held that plaintiff was the prevailing party in spite of the adverse judgment. Justice Mihara dissented. In *Goodman v. Lozano* (Cal.App. Fourth Dist., Div. 3; February 8, 2008) (As Modified March 7, 2008) 159 Cal.App.4th 1313, [72 Cal.Rptr.3d 275, 2008 DJDAR 2135], the court agreed with Justice Mihara and awarded costs to the defendant.

Note: Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, [369 P.2d 937, 939-940, 20 Cal. Rptr. 321, 323-324], any trial court may follow either precedent until the issue is settled by our Supreme Court. Contrary to federal practice, trial courts are not bound to follow precedent in their district if there are conflicting opinions from other districts. Each judge must decide which precedent is most likely to be correct.

FDA premarket approval precludes state damage suit for defective device. In a 8-1 decision (Ginsburg dissenting), the United States Supreme Court held in *Riegel v. Medtronic, Inc.* (U.S.Supr.Ct.; February 20, 2008) 128 S.Ct. 999, [169 L.Ed.2d 892, 2008 DJDAR 2524] that federal preemption barred plaintiff's suit against the manufacturer of a coronary catheter that ruptured during heart surgery. As long as there was premarket approval by the FDA and the device conformed to the approval, the States may not impose standards that are "different from, or in addition to, federal requirements." Permitting a tort suit would impose such state standards.

Note: Arguably the same rule may be applied in cases involving drugs approved by the FDA. However, this issue has not been determined decisively.

Court retains jurisdiction to renew judgment against out-of-state defendant. *Goldman v. Simpson* (Cal. App. Second Dist., Div. 4: February 20, 2008) 160 Cal.App.4th 255, [2008 DJDAR ___] held that, even though O. J. Simpson had moved to Florida, the California court that had rendered the original judgment against him retained jurisdiction to renew the judgment. The court's jurisdiction derived from its jurisdiction at the time of the original judgment.

Licensed ambulance drivers are covered under MICRA. Plaintiff was injured in an accident while riding in an ambulance operated by a licensed medical technician. He sued and the court permitted the introduction into evidence that medical expenses and lost earnings were reimbursed to him by

Litigation Section Events

A Week in Legal London
June 29-July 4, 2008

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program
Magdalen College, Oxford University

July 6-11, 2008

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

Click here: State Bar of California Week in the UK

Best Practices for Winning at Litigation & Trial

Saturday, April 26, 2008,
8:30 am to 4:00 pm
Mission Inn, Riverside CA

Co-Chairs: Robert M. Bodzin & Michael Geibelson
Honorary Chairs: Elizabeth Englund & Mark Mellor

Live Seminar:
$175 Litigation Section Members, (admitted 6 years or more)
$135 (admitted 5 years or less)
$210 Non Litigation Section Members, (admitted 6 years or more)

Webcast: $65 per hour

a collateral source. The Court of Appeal affirmed, holding that this was permitted under the *Medical Injury Compensation Act* (*Civ.Code* §§3333.1, 3333.2; *Civ.Proc*. §§340.5, 364.667.6, 1295; *Bus. & Prof.* §6146) because the defendants were "health care providers" covered by the Act. *See, Canister v. Emergency Ambulance Service* (Cal.App. Second Dist., Div. 8: February 22, 2008) 160 Cal.App.4th 388, [2008 DJDAR 2739].

Amendment to fee agreement is subject to statutory requirements. Client and lawyers entered into a properly drawn and executed contingency fee agreement. Thereafter, client signed an amendment increasing the amount of the fee. This document was not signed by the lawyers and did not comply with the requirements of *Bus. & Prof. Code* §6147 which includes a requirement that the agreement be signed by the lawyer as well as the client. The amendment was invalid and the lawyers were only entitled to the fee provided in the original valid fee contract. *Stroud v. Tunzi* (Cal.App. Second Dist., Div. 8; February 22, 2008) 160 Cal.App.4th 377, [2008 DJDAR 2735].

Lawyer who represents himself is not entitled to attorney fees. The anti-SLAPP statute (*Civ.Proc.* §425.16) provides that a defendant who successfully moves to dismiss an action under the statute shall recover attorney fees. After defendant, a self-represented lawyer, succeeded in having a complaint dismissed under the statute, the trial court granted his motion for attorney fees. The Court of Appeal reversed. In *Trope v. Katz* (1995) 11 Cal.4th 274, [902 P.2d 259, 45 Cal.Rptr.2d 241], our Supreme Court had held that a self-represented lawyer is not entitled to attorney fees under *Civ.Code* §1717 (contractual attorney fees). The same principle applied here. A necessary predicate for the recovery of attorney fees is the existence of an attorney-client relationship. *Taheri Law Group v. Evans* (Cal.App. Second Dist., Div. 8; February 26, 2008) 160 Cal.App.4th 482, [2008 DJDAR 2833].

Private attorney general may not recover expert witness fees. Under *Code Civ. Proc.* §1021, the so-called private attorney general statute, a court may award attorney fees to a plaintiff, under specified circumstances, if the action "resulted in the enforcement of an important right affecting the public interest." In *Olson v. Automobile Club of Southern California* (Cal.Supr.Ct.; February 28, 2008) 42 Cal.4th 1142, [2008 DJDAR 2937], plaintiff obtained reforms to defendant's procedures for electing its board of directors. Our Supreme Court held that, although they were entitled to attorney fees, the statute did not authorize an award for expenses incurred in retaining expert witnesses used in the trial.

Statute of limitations may not be tolled while defendant is out of state. *Code Civ. Proc.* §351 extends the statute of limitations for the period that defendant was outside California. But in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988) 486 U.S. 888, [108 S.Ct. 2218], the United States Supreme Court held that such a statute may unnecessarily burden interstate commerce because the state treats residents differently from non-residents. This exception to §351 may well swallow most of the rule. In *Heritage Marketing and Insurance Services, Inc. v. Chrustawka* (Cal.App. Fourth Dist., Div. 3; February 29, 2008) 160 Cal.App.4th 754, [2008 DJDAR 3079], the court held that where defendants, plaintiff's former employees, moved out of state to set up a business competing with plaintiff, the Commerce Clause precluded application of the §351 tolling provision. Absent tolling, the suit was barred by the statute of limitations. So, judgment for defendants was affirmed.

Note: When considering the application of §351, California cases decided before 1988 may no longer be correct. Determine whether the *Bendix* case compels a result different from that reached in these cases.